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In The Supreme Court of the United States

UNITED STATES POSTAL SERVICE,

Petitioner

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD. AND ARTHUR WAH

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the United States Postal Service is subject to suit for violation of the Sherman Act, 15 U.S.C. § 1 *et seq.*, and the Clayton Act, 15 U.S.C. § 12 *et seq.*

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the American Trucking Associations, Inc. (ATA), is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. ATA's membership includes more than 2,000 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents more than 30,000 companies and every type and class of motor carrier operation in the United States. ATA's membership includes transportation companies such as FedEx Corporation and United Parcel Service, Inc.

Amicus ATA has a significant interest in ensuring that the antitrust laws apply to the United States Postal Service to prevent it, when acting as a competitor, from engaging in monopolistic or anticompetitive conduct in the market for transportation of property. Complete exemption of a large and powerful competitor such as the Postal Service when acting outside its statutory "letter" monopoly would seriously interfere with the competitive operation of the marketplace. Moreover, permitting the Postal Service alone to be free from the antitrust laws' proscriptions would create an uneven playing field for competitors. Such conduct discourages innovation and increases prices, thus injuring consumers.

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[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of this Court along with this brief, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

A. Congress intended that the federal antitrust laws apply to all types of persons that are capable of monopolizing commercial markets or restraining trade because Congress enacted those laws to ensure that the market encourage economically efficient behavior and innovation to benefit consumers. Accordingly, this Court has held that the definition of "person" for purposes of the Sherman Act, 15 U.S.C. § 7, and the Clayton Act, 15 U.S.C. § 12(a), includes governmental entities such as States, foreign nations, and municipalities so that such entities are subject to suit for violation of those laws. *See, e.g., Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978). The court of appeals correctly held that the United States Postal Service (Postal Service) is similarly subject to suit for violation of the federal antitrust laws when it participates in competitive markets.

This Court's ruling in *United States v. Cooper*, 312 U.S. 600 (1941), that the United States was not included in the term "person" for purposes of bringing a damages action under former Section 7 of the Sherman Act, is not to the contrary. First, this Court has held that there is a presumption against implying an exemption from antitrust coverage that applies when determining who is an appropriate defendant under those laws. Second, longstanding precedent makes clear that determining whether an entity that is related to the federal government should be treated as the "United States" under a particular statute is not automatic, but requires a contextual inquiry based on the congressional intent underlying the statute. *See, e.g., Arkansas v. Farm Credit Servs.*, 520 U.S. 821 (1997); *United States Shipping Bd. Emergency Fleet Corp. v. Western Union Tel. Co.*, 275 U.S. 415 (1928). Third, the ruling in *Cooper* was based on the "scheme and structure" of the antitrust statute, which elsewhere explicitly authorized the United States to bring alternative kinds of actions under the federal antitrust laws. That rationale does not apply to the Postal Service, which is not elsewhere authorized by the statute to bring any type of action under the

federal antitrust laws. Indeed, the Postal Service itself has recognized on a prior occasion that it is not part of the United States in the context of the United States suing under the antitrust laws. *See United States v. AT&T Co.*, 461 F. Supp. 1314 (D.D.C. 1978).

B. Nothing in the statutes governing the Postal Service reflects an intent by Congress to exempt the Postal Service from federal antitrust laws and thereby provide it a competitive market advantage. To the contrary, the statutory text demonstrates that Congress intended that the Postal Service, when acting outside of its statutory monopoly relating to First Class or "letter" mail under the Private Express Statutes, 18 U.S.C. §§ 1693-1699; 39 U.S.C. §§ 601-606, be treated like the other participants in competitive markets and not as the United States. Congress expressly reorganized the Postal Service in 1970 as an "independent establishment," 39 U.S.C. § 201, and not as an agency or instrumentality of the United States. Congress also removed the Postal Service from the general supervision of the President and placed it in a category different from the typical executive branch entity.

Congress's intent to establish the Postal Service as independent and distinct from the United States is evident from the structure of the Postal Reorganization Act of 1970. Congress expressly stated in certain specific statutory provisions that it intended the Postal Service to be afforded a particular privilege that is afforded the United States. Congress thus made clear that it did not intend for the Postal Service generally to be able to take advantage of the privileges of the United States. None of the provisions in which Congress granted the Postal Service particular authority, such as eminent domain, provides support for the argument that Congress intended the Postal Service to be included under *Cooper*'s antitrust exemption for the United States. Moreover, Congress's express grant of authority to the Postal Service to "sue and be sued in its official name," 39 U.S.C. § 401(1), not only constitutes a waiver of sovereign immunity against damage actions, but also confirms that Congress intended the

Postal Service to be legally distinct from the United States.

The statutory text and history demonstrate that Congress's overriding purpose in enacting the Postal Reorganization Act was that the Postal Service "be run more like a business." *Franchise Tax Bd. v. USPS*, 467 U.S. 512, 520 (1984). That purpose negates any suggestion that Congress intended to exempt the Postal Service from the antitrust laws and thereby grant it a competitive advantage in the private marketplace where it competes in providing a wide range of products and services. Such an exemption would undermine the goal of the antitrust laws of ensuring efficiency and furthering consumer welfare.

The United States Department of Justice has recognized that the Postal Service is a business-like person appropriately subject to the antitrust laws. In a submission to the Postal Rate Commission, the Department noted that neither case law nor public policy indicated that the Postal Service enjoyed a comprehensive immunity from the federal antitrust laws. The Department based that view on a multi-step analysis that relied on the Postal Service's own prior position and the statutory text and structure.

C. Application of the federal antitrust laws to the Postal Service is not precluded by the nature of the postal monopoly or the remedies available under those laws. Congress's grant to the Postal Service of a monopoly to provide particular services in a particular manner does not preclude application of the federal antitrust laws to its conduct in other areas, as this Court's precedents make clear. Indeed, the Postal Service itself, in June 2002, endorsed a legislative proposal that would have expressly confirmed that it is subject to the Sherman and Clayton Acts with regard to its competitive activities. The Department of Justice similarly supported that provision to clarify existing law. Support of that legislation necessarily acknowledges that antitrust coverage is not inherently incompatible with the Postal Service's responsibilities and authority.

The normal availability of treble damages for violations of the antitrust laws does not indicate a congressional intent to exempt the Postal Service from those laws. The Lanham Act, which the Postal Service acknowledges applies to it, also provides for such a remedy. Further, this Court has held that the potential availability of treble damages is no reason to hold that a person is not covered by the antitrust laws, because it may be possible to read the laws to preclude such a remedy in certain situations.

ARGUMENT

THE POSTAL SERVICE IS SUBJECT TO SUIT FOR VIOLATION OF THE FEDERAL ANTITRUST LAWS

Congress enacted the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719, to reorganize the United States Postal Service (Postal Service) as an "independent establishment," no longer part of the political branches of government, and to encourage it to act more like a business. *See Franchise Tax Bd. v. USPS.*, 467 U.S. 512, 520 (1984).

Over the course of the intervening thirty years, the Postal Service has competed head-to-head with private enterprises, including marketing products (such as telephone calling cards, packing material, and stationery) and services (such as electronic billing and delivery of packages) over which it holds no statutory monopoly. Nothing in the Postal Reorganization Act or in the antitrust laws suggests that Congress intended the Postal Service to be free from the federal antitrust laws' prohibitions against anticompetitive and monopolistic behavior while acting in such competitive markets and outside its "letter" monopoly under the Private Express Statutes, 18 U.S.C. §§ 1693-1699; 39 U.S.C. §§ 601-606. Rather, the statute establishing the Postal Service, including its "sue and be sued" provision, reflects Congress's intent to include the Postal Service within the antitrust laws' scope.

Respondents, as the plaintiffs in this case, alleged that petitioner Postal Service violated the substantive provisions of both the Sherman Act, 15 U.S.C. § 1 *et seq.*, and Clayton Act, 15 U.S.C. § 12 *et seq.*, by suppressing competition and creating a monopoly in the production of mail sacks. Respondents brought their claims under Section 4 of the Clayton Act. Section 4 authorizes "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" (which includes the substantive provisions of the Sherman Act as well as the Clayton Act) to "sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent." 15 U.S.C. § 15(a); *see id.* § 12(a) (defining "antitrust laws"). Section 4 does not delimit who is an appropriate defendant. Most of the substantive antitrust provisions invoked by respondents in their complaint, however, impose their obligations only on "[e]very person," 15 U.S.C. § 2 (Section 2 of Sherman Act), or "any person," *id.* § 13 (Section 2 of Clayton Act); *id.* § 13a (Robinson-Patman Antidiscrimination Act); *id.* § 14 (Section 3 of Clayton Act), thus apparently requiring a defendant to be a "person" in order to be subject to suit under these provisions.[2]

[2] Section 1 of the Sherman Act, one of the other substantive provisions invoked by respondents in this case, does not limit its scope to "persons." *See* 15 U.S.C. § 1. It may be that even if the Court declines to interpret "person" to include the Postal Service, respondents' claim under Section 1 should proceed. *Cf. Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) ("The [Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices *by whomever they may be perpetrated.*" (emphasis added)).

A. The Postal Service Does Not Fall Within The *United States v. Cooper* Antitrust Exemption That Applies To The United States, But Not To Other Governmental Entities

1. Entities engaged in governmental functions are not generally exempted from the antitrust laws

This Court has compared the Sherman and Clayton Acts to the Bill of Rights and the Magna Carta as sources of economic freedom. *See United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972). Those statutes aim to promote consumer welfare through market efficiency and innovation by preventing the use of anticompetitive or monopolistic conduct. Their capacious language reflects Congress's intent that entities that might restrain competition or monopolize commercial markets, regardless of their nature or origin, be included within the statutes' coverage. *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944) ("On its face [the Act] shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states.").

Both the Sherman and Clayton Acts define the term "person" to "include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." 15 U.S.C. § 7 (Section 8 of Sherman Act), § 12(a) (Section 1 of Clayton Act). By introducing that list with the term "include," Congress made clear that "person" is not limited to corporations or associations. As the Court explained in *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 312 (1978), when it held that foreign sovereign states are "persons" under the federal antitrust laws, "[i]t is apparent that this definition is inclusive rather than exclusive, and does not by itself imply that a foreign government, any more than a natural person, falls without its bounds."

Embracing this inclusive approach for the past hundred years, the Court has held that the term "person" in the antitrust laws extends to entities engaged in governmental functions. Rejecting any "mechanical rule" that "the word 'person' as used in the antitrust laws excludes all sovereign states," *id.* at 316, 318, the Court has held that municipalities and States, as well as foreign nations, all fall within the scope of the antitrust laws both as plaintiffs, *see Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906) (municipalities); *Georgia v. Evans*, 316 U.S. 159, 162 (1942) (States); *Pfizer v. Government of India*, *supra* (foreign nations), and as defendants, *see City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 396-397 (1978) (municipalities); *Jefferson County Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 156, 171 (1983) (States). Persons are therefore not excluded from the coverage of the antitrust laws merely because they exercise governmental authority or engage in a "traditional government function." *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 55 & n.18 (1982).

2. This Court has consistently declined to extend privileges granted the United States automatically to related governmental entities

The Postal Service's argument for why it is not a "person" under the antitrust laws is that it falls within the exemption for the United States that was identified by the Court in *United States v. Cooper Corp.*, 312 U.S. 600 (1941). *Cooper* held that the United States could not bring suit under Section 7 of the Sherman Act (subsequently superceded by Section 4 of the Clayton Act, 15 U.S.C. § 15), which authorized suits for damages by "any person who shall be injured." 312 U.S. at 604, 614. But this Court has held that there is a "presumption against implied exclusions from coverage under the antitrust laws" in determining who is an appropriate defendant under those laws. *City of Lafayette*, 435 U.S. at 398. Thus, the Postal

Service is presumptively not covered by *Cooper*'s narrow exemption for the United States.

Although the Postal Service repeatedly invokes the label "agency or instrumentality" of the United States (USPS Br. 8, 9, 10, 17, 19, 22, 24), that is *not* the designation that Congress gave the Postal Service. *See* pages 15-17, *infra*. Even if it were, the mere designation of an entity as an "agency or instrumentality" does not entitle it to take advantage of the antitrust exemption intended for the United States. There is no blanket rule that any federal entity labeled an "agency" or "instrumentality" is entitled to all the benefits and protections to which the United States itself is entitled. Instead, this Court has stressed that determining whether an entity should be treated as the "United States" under a particular statute is a contextual inquiry based on the congressional intent underlying the statute.

For example, in *Arkansas v. Farm Credit Services*, 520 U.S. 821 (1997), the Court held that a Product Credit Association, an entity clearly designated by statute as an "instrumentality of the United States," 12 U.S.C. § 2071(b)(7), was not entitled to the exemption from the Tax Injunction Act, 28 U.S.C. § 1341, that the Court had previously implied for the United States in *Department of Employment v. United States*, 385 U.S. 355, 358 (1966). The Court explained in *Farm Credit Services* that "instrumentality status does not in and of itself entitle an entity to the same exemption the United States has under the Tax Injunction Act." *Id.* at 832. This was so even though the instrumentality's "mission is defined and controlled by federal law," *id.* at 828, and it is entitled to immunity from state taxes as "a consequence of its status as a federal instrumentality." *Id.* at 829.

The *Farm Credit Services* Court emphasized that "[a]n instrumentality of the United States can enjoy the benefits and immunities conferred by explicit statutes * * * without the further inference that the instrumentality has all of the rights and privileges of the National Government." *Ibid.* The Court made clear that a close examination of the

instrumentality in question and the purposes underpinning the particular right at issue is required. *See id.* at 829-832.[3]

Similarly, in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), the Court summarily rejected the claim of the Federal Deposit Insurance Corporation (FDIC) that it was entitled to the same treatment as the United States in determining when to apply federal common law. The Court simply responded: "[b]ut the FDIC is not the United States." *Id.* at 85.[4]

Another example of the rejection of a blanket rule is a trilogy of cases concerning the United States Shipping Board Emergency Fleet Corporation – *United States v. Strang*, 254 U.S. 491 (1921); *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922); and *United States Shipping Board Emergency Fleet Corp. v. Western Union Tel. Co.*, 275 U.S. 415 (1928). The Court described that entity as an "instrumentality of the Government of the United States" that had been vested with "enormous power," including the power

[3] This approach is consistent with the views expressed by the United States in that case. The United States argued there that mere designation as an instrumentality of the United States did not entitle an entity to take advantage of an exemption intended for the United States alone. *See* Brief for the United States as *Amicus Curiae* at 21, *Arkansas v. Farm Credit Servs.* (No. 95-1918) ("Numerous cases in the lower courts have recognized that an entity may be a 'federal instrumentality' for some purposes but not others."). *But compare* USPS Br. 19-20 & n.6 (citing Product Credit Association as an example of an agency or instrumentality that is "part of the federal sovereign").

[4] The FDIC is an entity created by federal law with a structure similar in some respects to that of the Postal Service. *See* 12 U.S.C. § 1812(a) (majority of FDIC's Board of Governors appointed by the President with the consent of Senate), § 1819(a)(10) (FDIC authorized to promulgate rules and regulations), § 1819(b)(1) (providing that FDIC "shall be an agency of the United States for purposes of section 1345 of title 28"), § 1818(c) (FDIC may issue cease-and-desist orders), § 1825(d) (obligations of FDIC backed by the full faith and credit of the United States).

"to condemn various forms of property," in order to build and acquire ships for use by the United States in World War I and to dispose of them afterwards. *Sloan Shipyards*, 258 U.S. at 570, 566. Nonetheless, the Court held that the instrumentality was not the United States for purposes of a bankruptcy statute that gave priority to claims of the "United States," nor for purposes of a statute granting the Court of Claims jurisdiction over damage actions against the "United States." *Id.* at 569-570.

Similarly, the Court held that an officer of that instrumentality was not an "officer or agent of the United States" for purposes of a federal criminal statute. *See Strang*, 254 U.S. at 493. And even when the Court held that that instrumentality was entitled to discount telegraph rates under a statute granting discounts to a "department[] of the government of the United States," the Court explained that its holding was not based on the fact that the entity was "an instrumentality of the government, but because it is a department of the United States within the meaning of the Post Roads Act." *Western Union*, 275 U.S. at 426. Confirming the contextual nature of the inquiry, the Court specifically noted that other entities denominated instrumentalities of the United States would not be entitled to the discount rates. *See id.* at 425-426.[5]

[5] Contrary to the Postal Service's claim (USPS Br. 20, 29), the court of appeals' determination that the Postal Service is a "Federal agency" for purposes of 28 U.S.C. § 1491(b)(1) (jurisdiction over challenges to bid solicitations) is not evidence of inconsistency. Such variations are to be expected given the contextual inquiry necessary in determining when an entity shares the benefits and obligations of the United States under any given statute. *Compare Reconstruction Fin. Corp. v. J.G. Menihan Corp.*, 312 U.S. 81, 83-86 (1941) (Reconstruction Finance Corporation was not "the United States" or its "agency" under civil procedure rule prohibiting awarding of costs because, "[w]hile it acts as a governmental agency in performing its functions, still its transactions are akin to those of private enterprises" and "the unqualified authority to sue and be sued placed [the entity] upon an equal footing with private parties as to the usual incidents of suit"), *with Cherry Cotton Mills v. United States*, 327 U.S. 536, 538-539 (1946)

(Continued on following page)

This Court's precedents thus evidence a great skepticism that agencies or instrumentalities are all generally entitled to the same privileges as the United States.[6]

3. The rationale of *Cooper* has no application to the Postal Service

The relevant inquiry, essentially unaddressed by the Postal Service, is whether the reasons for the Court's holding in *Cooper* that the United States should be deemed not a "person" under the federal antitrust laws also require a holding that the Postal Service is not a "person" under the antitrust laws. They do not.

a. The holding of *Cooper* was not based on any presumption that federal entities, or entities performing governmental functions, are not "persons" for purposes of the antitrust laws. The Court made clear that "there is no

(Reconstruction Finance Corporation was part of "the Government of the United States" under statute authorizing court to hear counterclaims in tax refund proceeding).

[6] *Sea-Land Service, Inc. v. Alaska Railroad*, 659 F.2d 243 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 919 (1982), the case primarily relied upon by the Postal Service in its effort to extend *Cooper* to all agencies and instrumentalities of the United States, does not address whether *Cooper* should be so extended. It appears from then-Judge Ginsburg's opinion for the court of appeals that the plaintiffs there did not seek to establish that the instrumentality (Alaska Railroad) was distinct from the United States. Instead, those plaintiffs had urged the court of appeals to limit *Cooper* to instances where the United States acts as a plaintiff and to hold that "the United States *and* its instrumentalities" are "persons" when sued as defendants under the antitrust laws. *Id.* at 245-246 (emphasis added). The court of appeals was apparently not confronted with, and thus did not address, the argument that *Cooper* did not necessarily apply to every instrumentality of the United States. To the contrary, the court of appeals in *Sea-Land Service* distinguished an earlier decision that permitted the District of Columbia Armory Board to be sued under the antitrust laws, *id.* at 246, thus implicitly recognizing that even entities created by Congress to perform government functions do not necessarily fall within the holding of *Cooper*.

hard and fast rule of exclusion" under the antitrust statutes. *Cooper*, 312 U.S. at 604-605. Rather, the *Cooper* Court emphasized that the "scheme and structure of the legislation" plainly reflected Congress's intent that the United States, even though a "juristic person," not be able to sue for damages. *Id.* at 604, 607. That was because the Sherman Act elsewhere authorized the United States to bring criminal prosecutions and because the Act elsewhere created an express cause of action for the United States to bring suits for injunctive relief and to seize property. *Id.* at 604, 607. Only the cause of action for damages did not expressly mention the United States. *Id.* at 607-608. The Court reasoned that this decision by Congress was deliberate because earlier versions of the legislation considered by Congress had provided for a damage action for the United States. *Id.* at 612. The *Cooper* Court thus held that the structure of the Sherman Act "envisaged two classes of actions, – those made available only to the Government, which are first provided in detail, and, in addition, a right of action for treble damages granted to redress private injury." *Id.* at 608.[7]

The Court's subsequent cases have read *Cooper* as limited to a holding about the United States and not as evidencing any rule that independent governmental entities are exempt from the antitrust laws. In *Georgia v. Evans*, decided the Term after *Cooper*, the Court held that States are "persons" under the antitrust laws. *Evans* emphasized that "[i]t was not held [in *Cooper*] that the word 'person,' abstractly considered, could not include a governmental body." 316 U.S. at 161. Instead, the *Cooper* Court had found that "Congress did not give to the Government, in addition to the other remedies exclusively provided for it, the remedy of treble damages – the only

[7] Congress subsequently amended the Clayton Act to expressly authorize the United States to seek damages by creating a separate cause of action. *See* Act of July 7, 1955, ch. 283, § 1, 69 Stat. 282, 282-283 (codified as amended at 15 U.S.C. § 15a).

remedy originally given to victims other than the Government of practices proscribed by the Act." *Id.* at 161-162; *accord Pfizer v. Government of India*, 434 U.S. at 316-317. As this Court explained in *Parker v. Brown*, 317 U.S. 341, 351 (1943), the *Cooper* exemption was "derived not from the literal meaning of the words 'person' and 'corporation' but from the purpose, the subject matter, the context and the legislative history of the statute."

b. The rationale of the Court in *Cooper* does not apply to the Postal Service. If the Postal Service is not recognized as a "person" under the antitrust laws, it will not be able to sue of its own accord under the causes of action created by those laws, whether for injunctive relief or otherwise. It will have no independent means of remedying or deterring injuries to its business or property caused by antitrust violations. The Postal Service, unlike the United States, was not granted any alternative means to vindicate its interests under the antitrust laws, such as the authority to initiate criminal prosecutions, to seek injunctive relief, or to seize property.

The United States cannot bring an antitrust suit for damages suffered by the Postal Service. The United States may sue for damages under the Clayton Act only when it is "injured in *its* business or property." 15 U.S.C. § 15a (emphasis added). The Postal Service's property is distinct from the property of the United States. *See* 39 U.S.C. § 401(6) (empowering Postal Service to construct buildings on "any property owned * * * by it"); *see also id.* § 2005(b) (discussing "the assets of the Postal Service"). Thus, injuries to the Postal Service's property and business do not fall within the United States' right of action for damages under the Clayton Act. *See United States v. General Elec. Co.*, 209 F. Supp. 197, 204-207 (E.D. Pa. 1962) (so holding for Tennessee Valley Authority).

Indeed, the Postal Service has on an earlier occasion recognized that, when the United States brings suit under the federal antitrust laws, the Postal Service is not part of

the United States. In *United States v. AT&T Co.*, 461 F. Supp. 1314 (D.D.C. 1978), the United States sued AT&T under Section 4 of the Sherman Act. AT&T then sought to discover documents in the possession of the Postal Service pursuant to Federal Rule of Civil Procedure 34, which governs production of documents by a "party." The Postal Service argued that it could be compelled to produce documents only through a subpoena issued pursuant to Rule 45, because it was "not a party to the action" – *i.e.*, not the "United States" – as required by Rule 34(c). *See* 461 F. Supp. at 1330 n.49, 1332 n.52. The district court agreed with the Postal Service, holding that the independence of the Postal Service from the rest of the government made it inappropriate to treat the Postal Service as the "United States" under the antitrust laws. *See id.* at 1335-1336 & n.65. Therefore, the rationale of *Cooper* for exempting the United States from the word "person" – because it could bring suit under other provisions of the antitrust laws – does not apply to the Postal Service and should be rejected as the basis for extending that exemption.

B. Congress Reorganized The Postal Service To Be An "Independent Establishment" Treated Like Other Market Participants And Not As The United States

1. The text and structure of the federal legislation governing the Postal Service demonstrate that Congress intended the Postal Service to be both independent and distinct from the United States

a. Despite the Postal Service's repeated invocation of the phrase "agency or instrumentality," *see* page 9, *supra*, Congress has not designated the Postal Service either an "agency" or an "instrumentality" of the United States. Congress expressly reorganized the Postal Service in 1970 as an "independent establishment of the executive branch." 39 U.S.C. § 201. The selection of those words by Congress has significance. The Office of Legal Counsel of the United States Department of Justice has explained,

with regard to a different statutory entity, that "[t]he term 'establishment' embodies the idea of a free-standing entity with its own structure and unity." Op. Off. Legal Counsel, 2000 OLC LEXIS 17, at *20 (May 11, 2000).[8]

The independent and free-standing nature of the Postal Service is intentional. Prior to the Postal Reorganization Act of 1970, postal matters were the responsibility of the Post Office Department. Congress removed the Postal Service from its prior status as a cabinet-level department of the Executive Branch in order to give it more independence – independence from politics and independence to manage its operations in "a business-like way." H.R. Rep. No. 91-1104, at 11 (1970); *see id.* at 12 ("the Postmaster General's presence in the President's Cabinet creates a link between partisan politics and the Postal Service"); S. Rep. No. 91-912, at 2 (1970) (Postal Service to have "unfettered authority and freedom * * * to maintain and operate an efficient service").

[8] Congress appears to have denominated only 16 other entities "independent establishments," and the Postal Service is the only independent establishment for which Congress has expressly waived sovereign immunity for damages. *See* 5 U.S.C. § 1101 (Office of Personnel Management); 15 U.S.C. § 2411 (National Center for Productivity and Quality of Working Life); 20 U.S.C. § 2004 (Harry S. Truman Scholarship Foundation); 20 U.S.C. § 4502 (James Madison Memorial Fellowship Foundation); 20 U.S.C. § 4703 (Barry Goldwater Scholarship and Excellence in Education Foundation); 20 U.S.C. § 5702 (Christopher Columbus Fellowship Foundation); 22 U.S.C. § 2452 note (Vietnam Education Foundation); 24 U.S.C. § 411 (The Armed Forces Retirement Home); 36 U.S.C. § 2301 (The United States Holocaust Memorial Museum); 39 U.S.C. § 3601 (Postal Rate Commission); 42 U.S.C. § 2286 (Defense Nuclear Facilities Safety Board); 42 U.S.C. § 10242 (Office of the Nuclear Waste Negotiator); 42 U.S.C. § 10262 (Nuclear Waste Technical Review Board); 42 U.S.C. § 11311 (Interagency Council on the Homeless); 44 U.S.C. § 2102 (National Archives and Records Administration); 49 U.S.C. § 1111 (The National Transportation Safety Board). *Compare* USPS Br. 20 n.6 (listing numerous "instrumentalities or agencies" with sue-and-be-sued clauses, but no "independent establishments" with such a clause).

Since 1970, the Postal Service has not been subject to the general supervision of the President. *See National Ass'n of Greeting Card Publishers v. USPS*, 462 U.S. 810, 822 (1983) (the Act "remov[ed] the Postal Service's principal officers from the President's direct control"). The Postmaster General is not appointed by the President and cannot be removed by him. *See* 39 U.S.C. § 202(c). Nor is the Postal Service's litigation or settlement of claims subject to the control of the Attorney General. *See* 39 U.S.C. §§ 401(8), 409(d), 2008(c); *see also Mail Order Ass'n of Am. v. USPS*, 986 F.2d 509 (D.C. Cir. 1993) (holding that Postal Service can continue litigating its case despite directives to the Board of Governors from the Department of Justice and the President to dismiss the suit); 3 Op. Off. Legal Counsel 253, 256 (1979) ("The peculiar status of the Postal Service exempting it to a large extent from Presidential control and from a substantial range of laws normally applicable to executive establishments necessarily has an impact on the control exercised by the Attorney General over postal litigation * * * .").

The Postal Service is not "within the executive branch of the Government as that term is commonly understood." *Id.* at 255; *accord* 1 Op. Off. Legal Counsel 79, 83 (1977) (Postal Service "has a degree of independence from the executive branch"). "[B]oth the Act and its history reveal that Congress intended to grant the Service at least some measure of insulation from control by the President and to place the Service in a separate category from the conventional executive departments." 5 Op. Off. Legal Counsel 239, 241 (1981). To hold that the Postal Service is nonetheless the equivalent of the United States, as the Postal Service now urges, defies congressional intent.

b. Combined with Congress's designation of the Postal Service as an "independent establishment," other features of the statutory scheme governing the Postal Service demonstrate that it is not equivalent to the United States for purposes of the antitrust laws. The structure of the Postal Reorganization Act illustrates that Congress intended to create a distinct legal person that presumptively is not subject to the laws that are usually applicable

to the federal government. *See* 39 U.S.C. § 410(a) ("Except as provided by subsection (b) of this section * * * no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.").

When Congress wanted the Postal Service to be treated the same as the United States, it expressly so provided. *See, e.g.*, 39 U.S.C. § 401(9) (authorizing Postal Service to "have the priority of the United States with respect to payment of debts out of bankrupt * * * estates"), § 409(b) (providing that procedural provisions governing suits "in which the United States, its officers, or employees are parties * * * shall apply in like manner to suits in which the Postal Service, its officers, or employees are parties"). If the Postal Service were correct that it was automatically to be treated as if it were the United States, then Congress's careful identification of such particular instances in which the Postal Service is to have the priority or other privilege of the United States would have been unnecessary and redundant. Congress's inclusion of those explicit provisions confirms that Congress did *not* intend the Postal Service automatically to share all the privileges to which the United States is entitled. In such circumstances, Congress's failure to provide that the Postal Service shares the United States' exemption from the antitrust laws is significant.

The Postal Service points to several provisions that, it argues (USPS Br. 13-16), reflect the "governmental character" of the Postal Service. But the question is not whether the Postal Service is, in some ways, a governmental body. As we discuss above, *see* pages 7-8, *supra*, governmental bodies generally are "persons" subject to the antitrust laws. And none of the specific grants of authority relied upon by the Postal Service provides any support for its argument that Congress intended the Postal Service to fall within the exemption from the antitrust laws for the United States described in *Cooper*. For example, the power of eminent domain (USPS Br. 15) does not convert an

instrumentality of the United States, let alone an independent establishment, into the United States. *Cf. Sloan Shipyards Corp.*, 258 U.S. at 567, 570 (holding that instrumentality of the United States with power of condemnation is not the United States for purposes of bankruptcy code). Nor does it immunize a person from the antitrust laws. *Cf. United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 332 (1897) (rejecting arguments of railroad companies that they are exempt from the Sherman Act because, *inter alia*, they are "public corporations * * * granted valuable franchises and privileges, among which the right to take the private property of the citizen in invitum is not the least").[9]

c. Finally, Congress's intent that the Postal Service not be treated as the United States for purposes of the antitrust laws is strikingly reflected in the authorization of the Postal Service to "sue and be sued in its official name." 39 U.S.C. § 401(1). As the Postal Service concedes (USPS Br. 17), that provision constitutes a waiver of its

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[9] Several of the provisions relied upon by the Postal Service reveal Congress's intent to distinguish between the Postal Service and the classic cabinet-level departments of the Executive Branch. For example, the Postal Service asserts (USPS Br. 15) that it may borrow on the full faith and credit of the United States. But in fact the statute authorizes it only to issue bonds on its own behalf, pledging its own assets and revenues as collateral. *See* 39 U.S.C. § 2005(b). If the Postal Service wants its bonds to be "obligations of the Government of the United States," entitled to "the full faith and credit of the Government of the United States," the Postal Service must first make a request to the Secretary of Treasury, who may so authorize "in his discretion" if he "determines that it would be in the public interest to do so." 39 U.S.C. § 2006(c). The Secretary of Treasury has never done so. *See H.R. 22, The Postal Modernization Act of 1999: Hearings Before the Subcomm. on the Postal Serv. of the House Comm. on Gov't Reform*, 106th Cong. 563 (1999) (Department of Treasury statement). Similar limits have been placed on the Postal Service's role in international conventions related to postal matters. *See* 39 U.S.C. § 407 (allowing Postal Service to negotiate postal conventions, but only consistent with the policy formulated and overseen by the Secretary of State).

sovereign immunity to damage actions.[10] But the "sue and be sued" clause in the Postal Reorganization Act does more than simply waive immunity. It also establishes that Congress intended the Postal Service to be legally distinct from the United States with its own, independent interests. As this Court has explained, the inclusion of the sue-and-be-sued clause in the Postal Service's organizational statute reflects Congress's intent that the Postal Service be "amenable to judicial process" just as "a private enterprise under like circumstances." *Loeffler v. Frank*, 486 U.S. 549, 555 (1988); *see also Franchise Tax Bd. v. USPS*, 467 U.S. 512, 520 (1984) (Court "must presume that the [Postal] Service's liability is the same as that of any other business"). Thus, the sue-and-be-sued clause is another clear indication that Congress did not intend this "independent establishment" to be entitled to the United States' exemption from the antitrust laws.

2. Congress did not intend to give the Postal Service the competitive advantage that would result from an antitrust exemption

Section 4 of the Clayton Act provides an avenue for relief against the Postal Service for violation of the federal antitrust laws when it participates in competitive markets.

In the Postal Reorganization Act of 1970, Congress instructed the Postal Service to raise funds to support itself, *see* 39 U.S.C. § 3621, and thus, in this regard, to "be run more like a business" than its predecessors. *Franchise*

[10] Assuming the Postal Service otherwise would have been entitled to the United States' sovereign immunity from suit, the sue-and-be-sued provision resolves the necessary "first inquiry" of "whether there has been a waiver of sovereign immunity," *FDIC v. Meyer*, 510 U.S. 471, 484 (1994), thus permitting the Court to address the "second inquiry" – and the sole question raised by petitioner before this Court – whether Section 4 of the Clayton Act "provides an avenue for relief" against the Postal Service. *Ibid.*

Tax Bd., 467 U.S. at 520; *cf.* 39 U.S.C. § 2009 (annual budget "shall be a business-type budget"). The Postal Service interprets the Postal Reorganization Act to empower it to market a wide range of products and services in order to raise revenues. The Postal Service concedes (USPS Br. 27) that it has entered into direct competition with private enterprise in the carrying of parcels and packages. *See Global Mail Ltd. v. USPS*, 142 F.3d 208, 215 (4th Cir. 1998) (Postal Service "is not an enterprise that occasionally affects commercial firms indirectly in its endeavors" but competes "head-to-head with a host of private courier services").

There is nothing in the text or structure of the statute creating the Postal Service that reflects an intent by Congress that, as the Postal Service enters competitive markets, it should not be held to the same antitrust standards as other market participants in order to ensure market efficiency and protect consumer welfare.[11] This is particularly true in light of Congress's determination to rely on competition in the marketplace to efficiently price and allocate services for the transportation of cargo. *See, e.g.*, S. Rep. No. 104-176, at 10 (1995) (Congress enacted the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, to abolish the Interstate Commerce Commission because "competition disciplines rates far better than tariff filing and regulatory intervention"); H.R. Conf. Rep. No. 103-677, at 88 (1994) (Congress enacted Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, § 601, 108 Stat. 1569, 1606, which preempts state laws related to a "price, route, or service" of cargo carriers, so that "[s]ervice options will be dictated by the marketplace; and not by

[11] Although there may be alternative remedies available to respondents in this particular case relating to contracting claims (USPS Br. 31-33), the scope of the anticompetitive conduct in which the Postal Service could engage far exceeds the scope of the Contract Disputes Act, 41 U.S.C. § 601 *et seq.*

an artificial regulatory structure"). Allowing the Postal Service to evade liability for anticompetitive or monopolistic conduct would threaten the operation of the competitive market for services related to the transportation of cargo that Congress intended to foster.

The competitive markets in which the Postal Service operates are not limited to delivery services. The Postal Service sells services such as electronic bill payment and other fund transfers as well. *See* General Accounting Office, *U.S. Postal Service: Update on E-Commerce Activities and Privacy Protections* 44 (2001). The Postal Service also sells telephone calling cards and retail merchandise, such as children's toys, greeting cards, and packaging products, both on-line and at post offices. *See* General Accounting Office, *U.S. Postal Service: Development and Inventory of New Products* 40, 46 (1998). These products and services directly compete with offerings by private persons in the relevant markets.

The Postal Service has announced that it intends to offer "new products and services" in new markets. General Accounting Office, *Major Management Challenges and Program Risks: U.S. Postal Service* 19 (2001). Such expansion will bring the Postal Service into competition with additional private industries. *See ibid.* (Postal Service will "face both traditional competitors in the delivery service sector, such as FedEx and United Parcel Service (UPS); and a broad range of competitors, such as technology companies, financial institutions, and foreign postal administrations."). The Postal Service also works closely with private companies. *See id.* at 35. Such expansion increases the risk of anticompetitive behavior. *See id.* at 34-35.

In comparable circumstances, it has been recognized that permitting the Postal Service alone to be exempt from regulation would create an uneven playing field for competitors. The Federal Communications Commission (FCC) determined that the Postal Service is a "person" subject to its regulation under the Communications Act of 1934, currently codified at 47 U.S.C. § 153(32), because the Postal Service "is a proprietary enterprise which, like

other government-owned entities that have been found subject to regulation, has been organized in a form similar to a commercial venture." *In re Graphnet Sys., Inc.*, 73 F.C.C.2d 283, 297 ¶ 38 (1979), *vacated as moot sub nom. USPS v. FCC*, No. 79-2243 (D.C. Cir. Oct. 14, 1980). The FCC concluded that supervision of the Postal Service was necessary to prevent the Postal Service from an unintended advantage in a competitive area. *See id.* at 296 ¶¶ 34-36, 297 ¶ 38. That rationale applies with equal force under the antitrust laws.

3. The United States has recognized that the statutory text and structure demonstrate that the Postal Service is subject to the antitrust laws

The FCC's assessment of the nature of the Postal Service is consistent with the views expressed by the United States Department of Justice. In 1978, the Department of Justice concluded that, despite the "technical[ ]" designation as an "independent establishment," "[a]t present, the U.S. Postal Service is essentially a Government corporation engaged in utility-like operations – the physical delivery and handling of documents and packages." Comments of the U.S. Department of Justice at 22, Postal Rate Comm'n Docket No. MC78-3 (Dec. 6, 1978).[12] It further concluded that, "while the point is by no means unarguable, neither the case law nor sound public policy would indicate that the Postal Service enjoys any comprehensive 'sovereign immunity' from the antitrust laws." *Id.* at 34.

In reaching the conclusion that the Postal Service is not exempt from the antitrust laws, the Department of Justice relied upon four factors. First, "as the Postal

[12] This document was filed by the Department of Justice with the Postal Rate Commission in response to a request for the submission of legal memoranda on the question, *inter alia*: "Is the [Postal] Service subject to the antitrust laws?" Cmts. of Dep't of Justice, *supra*, at 21.

Service itself has argued, its status is different from that of other Federal agencies." *Id.* at 29 (citing *United States v. AT&T Co.*, 461 F. Supp. 1314 (D.D.C. 1978)). Second, the "'sue and be sued' power conferred upon" the Postal Service reflects that the "Postal Service is 'business-like' in its operations." *Id.* at 30 (citing *Goodman's Furniture Co. v. USPS*, 561 F.2d 462, 464-465 (3d Cir. 1977)). Third, the "Postal Service does not now have, nor has it enjoyed in the past, any comprehensive statutory monopoly over the delivery of mail," and while it "does enjoy some limited monopoly over the delivery of 1st class and other 'letter' mail, a wide variety of alternative document delivery services are generally available." *Id.* at 30-31. Hence, "although the Postal Service remains a government 'establishment,' many of its service offerings are very similar to services offered by private firms." *Id.* at 30. And fourth, Congress "grant[ed] the Postal Service management very broad authority and considerable operational discretion" outside its limited monopoly and there is no reason why "even a lawful monopolist" should be exempt from "antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization." *Id.* at 31-32 (quoting *City of Lafayette*, 435 U.S. at 417).

The Department of Justice's view appears to have remained constant. As we discuss below, the Department of Justice (along with the Board of Governors of the Postal Service) supports legislative proposals that would expressly confirm that the antitrust laws apply to the Postal Service. *See* pages 26-27, *infra*.

C. Application Of The Federal Antitrust Laws To The Postal Service Is Not Precluded By Its Limited Statutory Monopoly Or The Remedies Available Under The Antitrust Laws

There is nothing in the text of the Postal Reorganization Act of 1970 that expressly precludes the Postal Service from being subject to the antitrust laws. The Postal

Service nonetheless contends (USPS Br. 26-33) that certain aspects of its organization and functions make it inappropriate to apply the antitrust laws to any aspect of its conduct in the marketplace. Such a complete exemption is disfavored. *See City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 399 (1978). It is also unwarranted in this situation.

1. The Postal Service contends (USPS Br. 28-29) that applying the antitrust laws to it would be unworkable because some of its conduct is mandated by federal law granting it a monopoly to provide particular services in a particular manner. But the fact that *some* aspects of its conduct are mandated by federal law does not preclude application of the federal antitrust laws to conduct which is not so mandated. *See* 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 244b, 244f (2d ed. 2000); *City of Lafayette*, 435 U.S. at 417 (plurality) ("even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization").

This Court has regularly concluded that even entities that are subject to federal regulation that requires or expressly authorizes conduct that would otherwise violate the antitrust laws are still subject to the antitrust laws. Instead of conferring a categorical exemption, the Court has held that the antitrust laws will give way "to make [the regulatory law] work, and even then only to the minimum extent necessary." *National Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross*, 452 U.S. 378, 389 (1981); *see* 1A Areeda & Hovenkamp, *supra*, ¶ 243e. The Court has adopted a similar standard in determining when antitrust laws will give way to authorization by a state law or state regulatory body. *See* 1A Areeda & Hovenkamp, ¶¶ 243e4, 248 (noting similarities between standards); *id.* ¶¶ 221-222 (discussing holdings of *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny regarding when authorization and supervision by state sovereign provides a defense for state agencies, municipalities, and private

persons sued under antitrust laws). In neither situation has a lawful mandate to engage in some monopolistic activity been the basis for a person's complete exemption from the antitrust laws.[13]

There is no inherent tension between the Postal Service's lawful monopoly over the delivery of letter mail pursuant to the Private Express Statutes, 18 U.S.C. §§ 1693-1699; 39 U.S.C. §§ 601-606, and its coverage under the antitrust laws for its competitive services, such as the delivery of packages or the sale of packing supplies. As discussed above, *see* pages 21-22, *supra*, the Postal Service participates in many markets in which it holds no lawful monopoly and competes against private entities.

2. In June 2002, the Postal Service itself endorsed a legislative proposal that would have expressly confirmed that the Postal Service is subject to the Sherman and Clayton Acts for its competitive activities. *See Postal Service Board of Governors Announces Support For Postal Reform Legislation*, U.S. Postal Service Press Release No. 02-048 (June 4, 2002) (announcing that "this Board supports the bill" sponsored by Reps. McHugh and Burton); H.R. 4970, 107th Cong. § 304(a) (2002) (postal reform bill sponsored by Reps. McHugh and Burton that, *inter alia*, provided that the Postal Service "shall be considered a person" for purposes of "the antitrust laws" when it "engages in conduct with respect to any product which is not reserved to the United States under section 1696 of title 18"). This proposal does not demonstrate that the Postal Service is not currently subject to the antitrust laws. As Congress was informed when considering an earlier version of the bill, although "there is compelling legal precedent to support the proposition that the Postal Service is already subject to the antitrust laws," the bill's

[13] The proper scope of any exemption that may be available for particular conduct is outside the scope of the question presented, which focuses only on whether the Postal Service is *ever* "amenable to suit under the antitrust laws." USPS Pet. i.

provision would fill the "chasm between legal reality, on the one hand, and the perception, myth and conduct of the Postal Service, on the other." *H.R. 3717, The Postal Reform Act of 1996: Hearings Before the Subcomm. on the Postal Serv. of the House Comm. on Gov't Reform*, 104th Cong., 912 (1996) (statement of the Air Courier Conference of America).

The Department of Justice has likewise expressed support for this provision, which it views as "clarify[ing]" existing law. *See* Letter from L. Anthony Sutin, Acting Assistant Att'y Gen. for Legislative Affairs, to Rep. John M. McHugh, at 2 (Aug. 5, 1998) ("we would support legislation that clarified the application of the Federal antitrust laws to activities of the USPS falling outside of the statutory monopoly"). The Department's Antitrust Division similarly supported the legislation. *See H.R. 22, The Postal Modernization Act of 1999: Hearings Before the Subcomm. on the Postal Serv. of the House Comm. on Gov't Reform*, 106th Cong. 314-315, 323 (1999). Thus, both the Postal Service and the Department of Justice acknowledge, outside of this litigation, that antitrust coverage is not inherently incompatible with the Postal Service's limited statutory monopoly.

3. The Postal Service also suggests (USPS Br. 28) that antitrust scrutiny is not needed because the political process will ensure that it is acting in the public interest. But Congress "did not leave this fundamental national policy [reflected in the antitrust laws] to the vagaries of the political process," establishing instead "a broad policy, to be administered by neutral courts." *City of Lafayette*, 435 U.S. at 406. In any event, as discussed above, Congress restructured the Postal Service in 1970 precisely to minimize oversight or control by the politically-accountable branches of government. *See also* S. Rep. No. 91-912, at 4 (1970) (Board of Governors will be "independent of ordinary legislative and executive supervision and control"); 116 Cong. Rec. 19,848 (1970) (Rep. Gross) (Postal Service is "completely and effectively remove[d] * * * from

any possible control by the people or the people's elected representatives"). Furthermore, this Court has previously rejected claims that government entities should be immune from the antitrust laws because they can be presumed to act in the public interest. *See City of Lafayette*, 435 U.S. at 403. The Court has held that competition by government entities may be "more invidious" than from private competitors because such entities can rely on public subsidies to undercut their competitors. *Jefferson County Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 158 n.17 (1983).

4. The Postal Service also suggests (USPS Br. 26-27) that the treble-damage remedy available under Section 4 of the Clayton Act indicates that Congress intended to exclude it from the antitrust laws. The same remedy is available under the Lanham Act for false and deceptive advertising, another form of misconduct that interferes with competition in the market. *See* 15 U.S.C. §§ 1125(a), 1117(a). Yet the Postal Service does not dispute (USPS Pet. Reply Br. 7) the unbroken holdings of the courts of appeals that the Postal Service is subject to private suit under that statute.

This Court has repeatedly held that the awarding of treble damages under the antitrust laws serves compensatory and deterrent purposes and is not inherently punitive. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635-636 (1985); *see also Cook County v. United States ex rel. Chandler*, 123 S. Ct. 1239, 1247 (2003) ("[t]reble damages certainly does not equate with classic punitive damages"). The Postal Service gives no reason why the potential availability of that remedy is a basis to exempt it from the antitrust laws' substantive standards. This Court has held to the contrary, reasoning that it may be possible to read the antitrust laws to distinguish between coverage and remedy in certain situations. *See City of Lafayette*, 435 U.S. at 401-402 (the conclusion that a city is a "person" does "not necessarily require the conclusion that remedies appropriate to

redress violations by private corporations would be equally appropriate for municipalities");[14] *Cook County*, 123 S. Ct. at 1247 (noting that unavailability of certain remedies (*e.g.*, imprisonment) against certain entities does not warrant excluding those entities from a statute's coverage entirely).

Finally, when the Antitrust Division of the Department of Justice testified in favor of the legislation, discussed above, that would confirm that the Postal Service is subject to the antitrust laws, it made clear that the cost of being subject to antitrust litigation "is a concern of all firms to which the antitrust laws apply." *H.R. 22 Hearings, supra*, at 332. The Division explained that such a concern would be dispositive "only if there is a demonstrable policy justification for shielding the USPS non-monopoly activities from antitrust scrutiny," and declared that, "[a]s a general rule, [it] disfavor[s] exemptions or protections that set one class of competitors apart from others under the law." *Id.* at 332-333.

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[14] The Court's determination that the potential availability of treble-damages does not limit the scope of the antitrust laws' coverage was consistent with the views of the United States in that case. *See* Brief for the United States as *Amicus Curiae* at 12 n.13, *City of Lafayette v. Louisiana Power & Light Co.* (No. 76-864) ("Any decision concerning the proper extent of damages liability should take place after the scope of antitrust coverage has been determined, for only then could the potential effects of damages awards upon municipalities and their officials be assessed accurately.").

CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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